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BOOK REVIEWS.

SIEGFRIED F. HARTMAN, *Editor-in-Charge.*

EQUITY: also THE FORMS OF ACTION AT COMMON LAW: Two Courses of Lectures, By F. W. MAITLAND, LL.D., D. C. L., Late Downing Professor of the Laws of England in the University of Cambridge. Edited by A. H. CHAYTOR, M. A., LL.B., and W. J. WHITTAKER, M. A., LL.B. New York: G. P. PUTNAM'S SONS. 1909. pp. xvi, and 412.

As Professor Dicey, who spoke with authority, said, "Maitland was a learned historian, as well as learned lawyer." It is easy, in consequence of the amount and high quality of his historical writing, to think of Maitland as a historian, rather than a lawyer. It is worth while, in order to overcome this impression, when estimating this book, to refer to what Maitland did to become a lawyer before he became a historian.

He read law with Mr. B. B. Rogers, who wrote of him, "He had not been with me a week before I found that I had in my chambers such a lawyer as I had never met before. * * * Every opinion that he gave was a complete legal essay, starting from first principles, showing how the question agreed with one, and disagreed with another, series of decisions, and finally coming to a conclusion with the clearest grasp of legal points and the utmost lucidity of expression." Mr. Rogers refers to *In re Cope*[1] and says the argument there attributed to him as counsel is really a copy of one of Maitland's opinions. Jessel, *M. R.*, sustained his contention in a brief opinion without citation of authority.

Twelve years of study and practice of the law might easily have confirmed Maitland as a lawyer, but a chance talk on a Sunday when lying on the grass in a park in Oxford with Professor Vinogradoff turned him from being a lawyer to a student of legal history, and ultimately in 1888, to election to the Downing Chair of the Laws of England, in Cambridge University.

Reference is made to this part of Maitland's life, because as he himself said, "The practicing lawyer distrusts the Professor of Law." However sound this may be, a long and steadily growing list of law books held in high esteem by the Bar can be made that are directly the academic product of teachers of law. To this list may be added this posthumous book of Maitland. Naturally, those who have admired his other writings, will ask if this has their high quality. It may safely be said that it has, with certain advantages in style, not always found in his other books, and that it is likely that these lectures will be read for a longer time and more widely than any other of his books. There is an unerring instinct on the part of law students to detect those books which throw light on the dark places. A glance about any law school library will show here and there these books soiled and battered. Like the pages of Miles Standish's copy of Cæsar's Commentaries, where

"Thumb marks thick on the margin,
Like the trample of feet proclaimed the battle was hottest,"

[1](1880) L. R. 16 Ch. Div. 49.

so these books show where the hot reading is. Maitland's book will be in this class.

These lectures, although published after his death and without his personal revision, were in such form that this could readily be done. Although written out very fully by Maitland, the editors had the good sense to use a student's note book to give the reader the benefit of the oral comment by Maitland when delivering them to his classes. There is no occasion for apology for this; it is as easy to read them as it would have been to listen to them; and, for precedent, there is the similar use Mrs. John Austin made of the notes taken by John Stuart Mill in her posthumous publication of her husband's law lectures.

It is obvious, then, that in this book we have a unique product. It is the work of a gifted historian having a practical knowledge of law, and the advantage of revision and discussion for eighteen years in the class-room. It is in the fact that he, for these many years, threshed out his subject with the students that makes the book peculiarly useful for a law sudent, and he will not be disappointed in reading it. The bulk of the lectures on Equity is taken up with Trusts, but this is preceded by a discussion of the Origin of Equity. The American student will be grateful for the chapter on Administration of Assets.

Maitland was a staunch advocate of the rule that there is no conflict between the rules of the Common Law and the rules of Equity. He admits a seeming conflict in some few cases (p. 157). "Was there a conflict about (so called) equitable waste?" he asks. "Perhaps there was * * * But it is needless to speculate about this matter for the Judicature Act specially provided for it."

Here was an opportunity for an "excellent diversetie" as Coke would have said. There are those who believe, in spite of Professor Langdell's view, that this same equitable waste is an equitable tort. It is arguable that it involves the violation of a right *in rem* and it would seem to be within the realm of substantive law. It is to be regretted that Maitland turned this point off so lightly.

The effect of the Judicature Act of 1873 on substantive rights is clearly brought out in many ways. "The Judicature Act did not alter the substantive law, save in a few points—did not change the nature of rights, or even give new remedies. It only made a thorough change in procedure." (p. 151)

It is interesting to contrast this book with Professor Langdell's Brief Survey of Equity Jurisdiction. The latter opens his book with the words, "Equity Jurisdiction is a branch of the Law of Remedies"; Maitland on the first page of his book says, "Equity is a certain portion of our existing substantive law." Both statements together are true, and neither alone is wholly true. It is not necessary in this connection to show why Professor Langdell is not wholly correct, nor why Maitland has over-emphasized his point of view. It is easy to see why, to Professor Langdell, Equity was a matter of remedy. He dwelt on its early history; Maitland dwelt on its recent history. This difference is seen in a comparison of the authorities cited by each. The former seldom cites a recent case; the latter seldom refers to anything earlier than the "Law Reports." It is interesting to observe how Maitland, in spite of his love for history, rejoices in the efficiency of modern Equity and so constantly dwells upon and illustrates his lectures with the details, most skillfully set

out, of the recent cases. One could hardly have a stronger illustration of the proposition, that Equity has developed a body of substantive law. The Remedial law tends to become in time the Substantive law. This is seen clearly in the case of equitable remedies, and is illustrated again and again by Maitland. In these two books the student is fortunate in having a most helpful presentation of the fundamental principles of Equity. Each supplements the other, and the student should read and compare them, one with the other.

With Maitland as with Langdell, equitable rights are *in personam* and not *in rem.* "Equitable rights and interests," says the former, "are rights *in personam,* but they have a misleading resemblance to rights *in rem.*" (p. 122). Chapters nine, ten and eleven are especially devoted to this, and to the further proposition that the Judicature Act did not abolish the distinction between Law and Equity.

Incidentally, the book is interesting as affording an illustration of the excellence of the lecture system at its best. It is difficult to see why such lectures should not be as stimulating and effective as the Case Method, when properly used. For a student to listen to the unfolding of a subject in an orderly and systematic way by a master, who, dwelling on the main topics, yet sufficiently fills in the gaps, would seem to be quite as useful as for him intensely to study a few cases, and be left in ignorance of their relation to the body of a topic. Both methods have utility, and neither should be used to the exclusion of the other. It would seem that such a course of lectures, after a student has been trained under the Case Method, would supplement and enrich his course.

If, in the lectures on Equity, we see Maitland at his best as a chancery lawyer, in the second part, where he deals with forms of actions, we have him at his best as a legal historian.

There is hardly any part of the common law on which this account of actions will not throw light. It will also be of use to the student of Constitutional Law.

N. A.

AN INTRODUCTION TO THE HISTORY OF THE DEVELOPMENT OF LAW. By HON. M. F. MORRIS. Washington, D. C.: JOHN BYRNE & Co. 1909. pp. 315.

This little work, the outgrowth of lectures delivered in Georgetown University by a Justice of the Court of Appeals of the District of Columbia, is a striking illustration of the conservative habit of mind which may go with legal learning. The currents of modern thought which have transformed the aspect of nature and of human society sweep in vain about the feet of an author who can still refer to the "wholly unsupported and irrational theory of evolution that would develop civilization from barbarism" (p. 11), who finds the highest development of jurisprudence "in the Codes of the three republics of Israel, Athens and Rome" (p. 315), and who would have us "go back to Sinai or to Eden for the source of our municipal law" (p. 17). The reference to the Garden of Eden as a source of municipal law is a little obscure, but we may let that pass and go on to the main thesis or purpose of the work which is to establish the superiority of ancient systems of law over the common law of England and the United States and to trace all that is good in the latter to the influence of the former. In this effort the author, starting with the Ten Commandments, "given by God Himself amid the thunders of Sinai,"